In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-77

MITCHELL ROTHBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Cannabis he possessed (Cannabis indica Lam.) is a different species of Cannabis from that identified in the statutory definition of marihuana (Cannabis sativa L.).

Petitioner, indicted in the United States District Court for the Eastern District of New York on seven counts of having unlawfully transported, concealed and sold hashish, in violation of 21 U.S.C. (1964 ed.) 176a, pleaded guilty to one count charging him with facilitating the transportation of 472 pounds of hashish. He was sentenced to imprisonment for a term of five years.

In a hearing prior to the guilty plea, petitioner made an offer of proof that Cannabis sativa L., the descriptive term for marihuana used by the definitional statute (26 U.S.C. (1964 ed.) 4761(2)), to which 21 U.S.C. 176a

refers, is only one of two or more botanical species of the genus Cannabis and that he had possessed Cannabis indica Lam., a separate species of Cannabis. In consequence, he claimed he could not be convicted of having violated the statute under which he was charged. The district court rejected the offer of proof (Pet. App. B, 351 F. Supp. 1115). The issue was preserved for appeal with the government's consent and the court of appeals affirmed (Pet. App. A).

Petitioner's contentions are fully answered in the opinions of the two courts below, upon which we rely. As the court of appeals pointed out, from the time of the enactment of 21 U.S.C. 176 and 26 U.S.C. 4761 to the time of the offense for which petitioner was charged, it was the shared belief of "lawmakers, the general public and overwhelming scientific opinion" that there was only one species of marihuana (Pet. App. A, p. A-4). It was the intent of Congress to outlaw this species. The use of the term "Cannabis indica" in 21 U.S.C. 209 (Act of March 3, 1915, 38 Stat. 820) did not reflect a contrary view, but only the tendency to refer to the same drug by different names (see Pet. App. B, pp. A-10—A-11). Petitioner had ample notice that his conduct was unlawful and there is thus no merit to his claims.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.